respondent was attending a seminar in Japan for five weeks beginning June 21, 1984. That request for yet another postponement was refused by me and the Senior Assistant Registrar informed the prosecution accordingly on June 28, 1984. Finally on July 9, 1984, before commencement of the trial the learned deputy together with both defence counsel sought permission to see me in Chambers. I indicated to them that I was not prepared to postpone the trial and suggested that we proceed with those witnesses who were available and who have been subpoenaed to attend court for the fourth time and that the prosecution could apply for an adjournment later. The learned deputy then without any objections from both defence counsel enquired whether I would agree to commence the trial later so that he could go and consult one of his more senior colleagues in the Attorney-General's Chambers. I agreed to stand down the case for one day and informed the parties that we should commence the trial the next morning. The next morning after the charge was read to the respondent he pleaded guilty whilst the other two accused persons claimed trial. I therefore stood down the case against the other two whilst I proceeded to deal with the case against the respondent. Having considered all the facts and circumstances of this case and bearing in mind the guidance of the Federal Court in its earlier decisions I considered that there were some circumstances in this case which might be considered exceptional. Whilst I appreciated that the amount of drug involved was large, yet I wondered if the respondent had had the benefit of an earlier trial, say in 1981 or 1982 before the amendment of the Act in April 1983, whether public opinion would then have so hardened as to demand that a court should impose the ultimate penalty of death on him. I think that in any particular case there would be room for differences of opinion on what would or could be considered to be exceptional circumstances. And whilst I was aware that a sentence of life imprisonment now for a conviction under section 39B(1) of the Act would be considered to be against the trend towards reasonable conformity in imposing death sentences even in cases of such offences occurring before April 15, 1983, yet admittedly out of some sense of compassion, I decided in the particular circumstances of this case to exercise my discretion and to impose on the respondent the sentence of imprisonment for life plus fourteen strokes of the rotan.

Sentenced accordingly.

Solicitors: *W.P. Leong & Partners; Augustin — Negrin & Co.*

PUBLIC PROSECUTOR v. JAMALUL KHAIR

[R. Cr. J. (Gunn Chit Tuan J.) August 3 & 20, 1984]

[Kuala Lumpur — Federal Territory Criminal Revision No. 7 of 1984]

Criminal Law and Procedure — Summary trial — Plea of guilty — Conviction — Postponed for sentence — Whether Magistrate functus officio — Application to withdraw plea — Criminal Procedure Code, s. 173 (m)(2).

In this case the accused was charged for two offences under sections 324 and 354 of the Penal Code respectively. He pleaded guilty. The facts of the case narrated by the prosecuting officer was also admitted by him. The learned President of the Sessions Court convicted him on the pleas of guilty but postponed sentence at the request of the accused. On the day fixed for sentence when the accused was asked whether he had any plea in mitigation, he informed the court that he wished to withdraw his pleas of guilty because they were not made voluntarily. The learned President allowed him to withdraw the pleas but subsequently referred the matter to the High Court for revision.

Held, the learned President was not *functus officio* in this case until she has passed a sentence or has otherwise finally adjudicated in the matter. There was therefore no need for an order of revision and the learned President should proceed with the case.

Cases referred to:

(1) *Wong Sing Yeow* v. *Public Prosecutor* [1968] 1 M.L.J. 230, 231.

(2) *S. (an Infant)* v. *Recorder of Manchester* [1970] 2 W.L.R. 21, 25.

CRIMINAL REVISION

Goon Soon Seng (Deputy Public Prosecutor) for the applicant.

S. Augustin for the respondent

Cur. Adv. Vult.

Gunn Chit Tuan J. : The record of this case was sent to me by one of the Presidents, Sessions Court, Kuala Lumpur, for the purpose of revision or directions. The accused was charged in the Sessions Court, Kuala Lumpur, for two offences under section 324 and section 354 of the Penal Code respectively. After the two charges were read and explained to him, he pleaded guilty to both charges. The facts of the case narrated by the prosecuting officer were also admitted by him. The learned president recorded his pleas, found him guilty on both charges and convicted him accordingly, but did not pass sentence on that day because the accused requested a postponement of sentence. On the day fixed for sentence, when the accused was asked whether he had any plea in mitigation of sentence, he informed the court that he wished to

withdraw his pleas of guilty because they were not made voluntarily. He also said that on the previous day he was facing financial problems and did not have a lawyer. As the learned President accepted the reasons given by the accused she allowed him to withdraw his pleas of guilty. But after the said President had granted permission to the accused to withdraw his pleas she thought that she might have erred in not complying with the relevant provisions of the Criminal Procedure Code regarding finding and sentence and therefore sent the record of the proceeding to me for revision.

Although the said President had in mind the provisions of section 183(ii) of the Criminal Procedure Code (F.M.S. Cap. 6) regarding finding and sentence by the High Court in a trial without assessors, the learned deputy correctly pointed out that the relevant provisions applicable to a summary trial by magistrates are in section 173(m)(2) of the said Criminal Procedure Code which is as follows:-

"If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law."

The learned deputy then drew my attention to *Wong Sing Yeow* v. *Public Prosecutor*[1] in which case an accused person was charged with the offence, but sentence was deferred at the request of the prosecution. When the accused later appeared for sentence, he was represented by counsel who informed the court that his client wished to withdraw the plea of guilt.

The magistrate refused to permit the plea to be withdrawn and the accused was accordingly sentenced. On appeal to the High Court, Kota Bahru, Wan Suleiman J. (as he then was) dismissed the appeal and held *'inter alia'* that the magistrate was *functus officio* after having recorded a conviction against the accused and therefore he could not permit the plea of guilty to be withdrawn. The learned deputy therefore contended that the President in this case was also *functus officio* and she should not have allowed the accused to withdraw his pleas and should have passed sentence on him according to law.

On the other hand Mr. Sidney Augustin, who appeared for the accused, drew my attention to the fairly recent English House of Lords' case of *S. (An Infant)* v. *Recorder of Manchester*[2]. In that case S., then aged 16, appeared before a juvenile court on a charge of attempted rape. He consented to be tried summarily, and pleaded guilty. The plea was accepted and the magistrates entered a finding of guilt. The hearing was then adjourned for the purpose of enquiring into his physical and mental condition. On the adjourned hearing S. was legally represented and his lawyer, having drawn the attention of the court to his mental condition and to what was said to be instances of previous spurious confessions on his part, asked that he be allowed to withdraw his plea of guilty and to plead not guilty instead. The magistrates, however, refused the application on the grounds that they were *functi officio* and had no such authority. They therefore proceeded to consider the medical reports on S. and made an order against him under the U.K. Mental Health Act, 1959. On appeal to the House of Lords from the Divisional Court, which had dismissed an appeal by S, it was held, allowing the appeal, that a court of summary jurisdiction which had accepted a plea of guilty to the offence charged was not in law debarred from permitting (at any time before passing sentence) a plea of not guilty to be substituted. That, accordingly, on the facts found it was open to the juvenile court to permit S. to withdraw his plea of guilty and to substitute therefore a plea of not guilty.

With respect, I thought that Wan Suleiman J. (as he then was) was only concerned with the facts and circumstances of *Wong Sin Yeow's* case when he said in his judgment in that case that he was "inclined to the view that in this appeal, having recorded a conviction against the appellant, the learned magistrate was *functus officio* and cannot therefore permit the plea to be withdrawn." But in this case I agreed with Mr. Augustin that it would be useful to note the following observations on the meaning of 'conviction' by Lord Reid in the above-mentioned House of Lords' case:

"Much of the difficulty has arisen from the fact that 'conviction' is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt. It is proper to say that a plea cannot be changed after 'conviction' in the former sense. But it does not at all follow that a plea cannot be changed after conviction in latter sense."

Wong Sin Yeow's case is therefore distinguishable as Wan Suleiman J. (as he then was) was obviously using the word 'conviction' in the former sense referred to by Lord Reid in his above-quoted *dictum*. Although Lord Reid in that House of Lords' case was referring to the word "conviction" used in the U.K. Magistrates' Courts Act, 1952, and that word is not in the above-quoted section

173(m)(2) of our Criminal Procedure Code (F.M.S. Cap. 6) yet I would with respect prefer to follow and adopt the reasoning of Lord Reid in that case that one cannot infer any intention of the legislature to alter as regards summary jurisdiction the old rule that a plea can be changed at any time before final disposal of the case. In the words of Lord Reid it "cannot be right because everyday accused persons who begin by pleading not guilty change their plea to guilty after the plea of not guilty has been recorded and the trial has begun, and that raises no technical difficulty". It follows that if a court upon all the facts before it thinks it is proper to accept a plea of guilty then the court may permit that plea to be withdrawn and a plea of not guilty accepted at a later stage up to sentence, that is, until final adjudication. I therefore considered that the said President was not *functus officio* in this case until she has passed a sentence or has otherwise finally adjudicated the matter. In the circumstances there was no need for any order of revision, and I directed that the learned president should proceed to try the case.

Order accordingly.

Solicitors : *Augustin-Negrin & Co.*

PUBLIC PROSECUTOR v. TAN SEOW CHUAN

[O. Cr. J. (Peh Swee Chin J.) July 26 & September 1, 1984]

[Seremban – Criminal Trial No. 2 of 1984]

Criminal Law and Procedure – Charge of trafficking in opium – Custody – Possession – Power of disposal – Cautioned statement – Prima facie case – Evidence of accused – Burden on accused – Admissibility of statements – Application to impeach credit of witnesses – Dangerous Drugs Act, 1952, ss. 37(d) & 39B – Criminal Procedure Code (F.M.S. Cap. 6), s. 113.

Dangerous Drugs – Opium – Charge of trafficking – Prima facie case – Burden on accused.

In this case the accused was charged with trafficking in opium. The accused was alleged to have possession of the opium found in a house raided by the police. The learned trial judge held that there was a *prima facie* case against the accused and called on him to enter on his defence. The accused gave evidence that he was not the occupier of the room where the opium was found and he did not have custody of it.

Held, it was a matter of grave doubt as to whether the accused had custody or control of the opium found in the room in the house. In any event he had no power of disposal of the opium and could not be said to have possession of it. The accused should therefore be acquitted.

Cases referred to :

(1) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(2) *Dato Mokhtar bin Hashim* v. *Public Prosecutor* [1983] 2 M.L.J. 232.
(3) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57.
(4) *Meering* v. *Graham-White Aviation Co. Ltd* (1919) 122 L.T. 44.
(5) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105.
(6) *Toh Ah Loh & Anor* v. *Rex* [1949] M.L.J. 54.
(7) *Leow Nghee Lim* v. *Reg* [1956] M.L.J. 28, 29.
(8) *Chan Pean Leon* v. *Public Prosecutor* [1956] M.L.J. 237, 238.
(9) *Public Prosecutor* v. *Ang Boon Foo* [1981] 1 M.L.J. 40.
(10) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.

CRIMINAL TRIAL.

Mohamed Zaki bin Mohamed Yasin (Deputy Public Prosecutor) for the Public Prosecutor.

Mahadevi Ganeshmurugan Seeralan for the accused.

Cur. Adv. Vult.

Peh Swee Chin J. : The accused is charged for an offence under section 39B (1) and punishable under section 39B (2) of the Dangerous Drugs Act, 1952, (the Act) for trafficking in opium.

The prosecution story is that PW 1, an inspector of police attached to the Anti-Narcotics Branch of the Seremban Police, received information on the telephone at 9.15 a.m. on October 14, 1983 of an offence relating to dangerous drugs at Lukut. Such information was then reduced in writing. He then led a party of nine other policemen, to an unnumbered house at Sungei Salak Estate, Siliau, Lukut, apparently in pursuance of the information received. On arrival at the said house, he said he found a Chinese man in the hall or living room of the said house. It is not disputed by anyone, that the man so found was the accused in this case, an old man of 69 years. He identified himself as a police officer to the accused and asked for the latter's name which was given. Then followed a very short conversation between the accused and PW 1 which I had ruled inadmissible on hearing and upholding objections against it. I will set it out also. PW 1 asked the accused where his room was and the accused said it was the first room on the left as one entered the said house. PW 1 told him he wanted to examine the said room. At this juncture, three Chinese women came to join the